STATE OF MICHIGAN

COURT OF APPEALS

KEITH HARRIS,

Plaintiff-Appellant,

v

TURNER CONSTRUCTION COMPANY, and PACE MECHANICAL,

Defendants-Appellees.

UNPUBLISHED
May 16, 2006

No. 263679
Wayne Circuit Court
LC No. 03-335339 CD

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10), to defendants on Count I – employment retaliation in violation of the Elliot Larsen Civil Rights Act (ELCRA), and Count IV – conspiracy to violate civil rights, of plaintiff's complaint. We affirm. This case arose when plaintiff was terminated from his foreman position with Turner Construction Company (Turner). He alleged he was terminated in retaliation for protesting the sexual harassment of Marriott employee Sandra McElhenie by an employee of Pace Mechanical (Pace), one of Turner's subcontractors.

According to McElhenie, on September 12, 2000, while she was discussing her recently discovered pregnancy with coworkers, Pace foreman Flin Fike approached and made several racially and sexually demeaning comments. There are several different versions of what was actually said; however, a determination of the correct version is not necessary to resolution of the instant appeal. She ran away because she was upset by the comments. She encountered plaintiff later that same day; when he asked her why she was upset, she told him about the incident. She reported the incident to the manager for her department and Marriott's loss prevention officer. On September 13, 2000, she filed a written complaint. On September 15, 2000, McElhenie's manager followed up on the complaint with the loss prevention officer.

Plaintiff testified that during this time, he reported the incident to Rich Maynard, one of Turner's project superintendents. Maynard informed him that Turner was aware of the incident. After speaking with Michael Wright, a general foreman for Pace, Mark Kreinbrink, a project superintendent for Turner, forwarded a copy of McElhenie's complaint to Tom Flory at Pace for his "response and corrective action" on September 20, 2000. According to Pace President John Hilf, after he was informed by Kreinbrink about the complaint, he investigated. On September 22, 2000, Pace forwarded Fike's version of the incident, Fike's written apology, and a letter

indicating Fike's crucial role at Pace to Turner. These documents were forwarded to Hines, the management company for Marriott, on September 25, 2000. According to plaintiff, McElhenie was upset during the time Fike was working at the Marriott, and every time she said she was upset, plaintiff would tell his supervisor Harold Bundrent or someone else at Turner. However, according to McElhenie, she did not recall seeing or speaking with plaintiff after September 12, 2000.

Fike testified that his last day on the Marriott project was October 3, 2000. Notes obtained from the union indicate that representatives from Turner, Hines, Pace, and Marriott met on October 9, 2000, and representatives from Turner, Hines, and Pace met with Fike on October 18, 2000 to discuss the incident. Fike testified that the meeting occurred at the Marriott. Other than the October 18, 2000 meeting, Fike testified that he did not return to the Marriott job until the end of December 2000 or beginning of January 2001

On October 25, 2000, Leo Frank Davis, a long-time friend and coworker of Fike, wrote a letter to Ronald Dawson, a project executive at Turner, concerning an incident that occurred between plaintiff and himself on October 24, 2000. According to the letter, plaintiff approached him asking when Wright would be around; plaintiff heard that Fike was returning to the site and wanted to talk to Wright because he never liked Fike. Davis told plaintiff to stay out of it. Plaintiff was "very rude and very hostile" toward him, and at one time he thought the situation would become physical. Davis asked that Turner explain to plaintiff that his scope of work did not include harassing other crewmembers on the job. The letter was copied to Wright and several individuals at Turner including Bundrent. Plaintiff responded with a letter of his own to Dawson on the same day. Bundrent terminated plaintiff's employment on October 27, 2000. Plaintiff filed the instant complaint October 23, 2003.

A trial court's ruling on a summary disposition motion is reviewed de novo in a light most favorable to the nonmoving party. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). A motion made under MCR 2.116(C)(10) tests the factual support for a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Plaintiff first argues the trial court erred by granting defendants summary disposition because the court failed to consider the evidence in a light most favorable to plaintiff, the nonmovant, when plaintiff presented evidence of retaliation under ELCRA. Specifically, plaintiff argues the trial court erred in deciding issues of fact and credibility and disregarding plaintiff's evidence of a causal connection between his protected activity and his termination. We disagree.

A trial court may not make factual findings when deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). However, when the nonmoving party fails to set forth evidence establishing a factual issue, the court may grant summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Pursuant to ELCRA, an employer may not:

> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint,

> testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701.]
>
> To establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*DeFlaviis v Lord & Taylor*, 223 Mich App 432, 436; 566 NW2d 661 (1997), citing *Polk v Yellow Freight Sys Inc*, 876 F2d 527, 531 (CA 6, 1989).]

The trial court found that plaintiff failed to establish a prima facie case of retaliation against Pace because he failed to show that Pace took an employment action adverse to plaintiff. According to the court, plaintiff failed to show that Leo Frank Davis, a Pace employee, was acting on Pace's behalf or with Pace's knowledge when he wrote a letter complaining about plaintiff to Ronald Dawson, a project executive at Turner. We find that the deposition testimony of Pace's employees and former employees is consistent with the court's finding. Plaintiff nevertheless argues that Pace knew of his protected activity. To support his argument, he cites a letter, written by himself, in which he claims an unnamed foreman at Pace agreed with plaintiff that Davis' letter was in retaliation for his support of Flin's removal, and told plaintiff he would tell Pace's superintendent that plaintiff had good work ethic.

Although the letter clearly indicates plaintiff's subjective belief that he was a good employee and that Davis' letter was retaliatory, speculation and conjecture are insufficient to withstand a summary disposition motion. *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005). Plaintiff failed to present the testimony of a Pace foreman to support this belief, and a mere promise to present evidence at trial is insufficient to withstand a summary disposition motion. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 305; 701 NW2d 756 (2005).

Plaintiff also claims there were several meetings between Turner, Pace, and Hines with respect to the McElhenie incident and his complaints. While plaintiff produced notes purportedly with respect to union representation of Fike during October 2000, and the notes indicated several meetings took place; there is no indication from the notes that the supposed references to plaintiff – located on a separate sheet from the notes of the meetings – were conveyed to Pace management. In fact, the notes of the meetings do not refer to plaintiff in any fashion. Moreover, there is no indication who authored the notes and no verification of their authenticity. Again, plaintiff could have provided the testimony of the notes' author to establish Pace's knowledge of plaintiff's involvement in protected activity. *Trentadue, supra* at 305.[1]

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[1] Plaintiff argues that the court erred in relying on *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464; 652 NW2d 503 (2002), overruled *Elezovic v Ford Motor Co*, 472 Mich 408 (2005), for the proposition that individuals could not be personally liable. We decline to address this improperly presented argument because no individuals were named as defendants in the lawsuit.

Given plaintiff's failure to establish a genuine issue of material fact with admissible evidence, the court properly granted Pace summary disposition. *Quinto, supra* at 362-363.

With respect to Turner, the court found that plaintiff failed to establish a prima facie case because he failed to establish a causal connection between the protected activity and the adverse employment action. A plaintiff must show more than merely a closeness in time between a protected activity and an adverse action to prove causation in a retaliatory discrimination case. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 286; 696 NW2d 646, amended 473 Mich 1205 (2005). To establish a causal connection between a grievance and an adverse employment action, a plaintiff must show that the defendant demonstrated a discriminatory animus against the plaintiff and that, as a result of the animus, the defendant retaliated against the plaintiff for filing the grievance. *Id.* at 288.

The court noted plaintiff's argument that he established a causal link by evidence that (a) several Turner employees told him he would still have a job if he had kept his mouth shut, (b) Turner had no documentation concerning his purportedly poor work habits, (c) his employment was terminated within two months of the McElhaney incident, and (d) his employment was terminated within two days of the October 25, 2000 letter from Davis. It found, however, that plaintiff failed to establish that the McElhaney incident was a motivating factor in his termination. With respect to the argument that he would still have a job if he had kept his mouth shut, we again note that plaintiff provided no testimony or even full names of the employees who purportedly told him this. Because hearsay is generally not admissible evidence, MRE 802, evidence in opposition of a motion for summary disposition may only be considered if it is admissible, MCR 2.116(G)(6), and a plaintiff may not merely promise to provide admissible evidence at trial, *Trentadue, supra,* we find plaintiff's argument in this regard failed.

With respect to the argument that Turner had no documentation concerning his purportedly poor work habits, we note the record is replete with evidence that plaintiff failed to get along with his supervisor, his coworkers, and his crew. Moreover, although plaintiff asserts he was an excellent and highly valued employee who received outstanding ratings, there is nothing in the record other than his own general statements to support his bare claims. Conclusory allegations without detail are insufficient to establish an issue of material fact. *Quinto, supra* at 371-372.[2] Because plaintiff's remaining two arguments involve the proximity in time between his engaging in the protected activity and the adverse action, we find that plaintiff has failed to establish a causal connection. *Garg, supra* at 286. Because of our disposition of the causal connection issue, we need not address plaintiff's argument that the court erred by accepting as legitimate defendants' proffered reasons for adverse employment actions and rejecting plaintiff's evidence of pretext.

Plaintiff next argues the court erred in dismissing his claim of conspiracy. We disagree.

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[2] Our review is limited to evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

The trial court found that because plaintiff failed to establish a retaliation claim, plaintiff failed to establish that defendants conspired to accomplish an unlawful act and, therefore, could not establish a claim of civil conspiracy. Plaintiff attempts to distinguish on its facts the case cited by the trial court, *Fenestra, Inc v Gulf American Land Corp,* 377 Mich 565; 141 NW2d 36 (1966), and appears to argue that an unlawful purpose is not required to maintain a claim of civil conspiracy. We disagree with plaintiff's analysis. Although it is true the Supreme Court found that the plaintiff in *Fenestra* failed to prove an unlawful purpose, *id.*, at 601, 603, the Court merely indicated that the plaintiff failed to meet a required element to prevail. It clearly indicated that a wrongful act causing damage was a necessary element of civil conspiracy. *Id.* at 593-594. Regardless, plaintiff's conspiracy count was premised on MCL 37.2701. The plain language of the relevant portion of the statute provides, "[t]wo or more persons shall not conspire to . . . . retaliate or discriminate against a person." Because plaintiff agreed to dismiss his claim of racial discrimination, and the trial court properly found plaintiff was unable to prove retaliation, we find that the trial court properly found plaintiff was unable to meet one of the necessary elements in his conspiracy count.

Plaintiff also argues that the court abused its discretion in denying his motion for reconsideration. Because this argument was not properly presented in the statement of issues, we decline to address it, *Caldwell v Chapman,* 240 Mich App 124, 132; 610 NW2d 264 (2000), other than to note that a trial court does not abuse its discretion in denying a motion for reconsideration when the motion merely presents the same issues previously argued, and the new evidence could have been presented the first time the issue was argued, *Churchman v Rickerson,* 240 Mich App 223, 233; 611 NW2d 333 (2000).

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio